Supreme Court of the United States.

213 & 214.

Nos. 583&584.

No. . October Term, 1904.

Ex Parte First National Bank of Baltimore, Md.

No. . October Term, 1904.

Ex Parte Receivers of the Virginia Iron, Coal and Coke Company.

Answer of William H. Staake, Trustee of C. R. Baird & Co., Bankrupts, to the Petitions of First National Bank of Baltimore, Md., and Receivers of the Virginia Iron, Coal and Coke Company for Writs of *Certiorari* requiring the Circuit Court of Appeals for the Fourth Circuit to Certify to the Supreme Court of the United States, for its Revision and Determination, Writs of Error taken by said Petitioners.

H. GORDON McCOUCH,
S. & M. GRIFFIN,
SAMUEL W. COOPER,
JOHN DICKEY, JR.,
ARTHUR G. DICKSON,
For Respondents.

Allen, Lane & Scott, Prs., Phila.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1904. No. .

First National Bank of Baltimore, Md., Petitioner,

vs.

William H. Staake, Trustee of C. R. Baird & Co., Bankrupts, Respondent.

October Term, 1904. No .

Receivers of the Virginia Iron, Coal and Coke Company, Petitioner,

vs.

William H. Staake, Trustee of C. R. Baird & Co., Bankrupts, Respondent.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The answer of William H. Staake, trustee of C. R. Baird & Co., bankrupts, respectfully shows:—

Both of the above petitions present the same question and are practically in the same language. Both admit that these are the only cases of the kind which have arisen under the Bankruptcy Act, and in making that admission the petitioners show they should not be allowed the writs

for which they pray. The decisions of the Circuit Courts of Appeals were intended by the Bankruptcy Act to be final, and it is only where the question involved is a Federal one or where its determination is essential to the uniform construction of the Bankruptcy Act that an appeal from the final decisions of the Circuit Courts of Appeals will be allowed. No Federal question is involved in the present cases. The petitioners have endeavored to raise the ground of uniformity of construction as the reason for granting them special appeals in these cases. The admitted fact, already referred to, that in almost seven years of the Bankruptcy Act and under the previous Acts that have been in force in the United States this is the only question of the kind which has arisen ought to be sufficient to show this Honorable Court that these are not cases in which special appeals should be allowed, but in order to escape this obvious objection to their right to appeal, the petitioners point to an incidental part of the decision and urge that the Circuit Court of Appeals for the Fourth Circuit as to that is in conflict with other Circuit Courts of Appeals.

On behalf of the trustee of C. R. Baird & Co., bankrupts, it is urged that a difference of opinion between Circuit Courts of Appeals as to incidental questions does not afford a reason for granting special appeals, and further it is denied that as to this incidental question, there is any conflict of decision. What constitutes a preference has been definitely determined, and the decisions relied upon by the petitioners as being in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit, were called to the attention of that court when these cases were argued before it.

The contention of the petitioners is that the Circuit Court of Appeals for the Fourth Circuit has in these cases decided that a lien which does not bind the property of a bankrupt can work a preference in favor of its holder over his other creditors, and that it should, therefore, be declared void. This contention is inaccurate in two respects. Both the District Court and the Circuit Court of Appeals based their decision upon the

language of section 67*f*, the District Court saying that the section "exactly fits the case," and the Circuit Court of Appeals saying "There is therefore in the facts of this case a literal gratification of the words of this section." In answer to the contention that section 67*f* is confined to liens which create a preference, that these liens were not preferences, and that, therefore, they could not be annulled under that section, the district judge, while stating that he could not see why the enforcement of these liens would not give the creditors who held them a preference, further said that section 67*f* was not confined to liens that create a preference, "its language expressly embraces all liens as were the liens in the case at bar." The Circuit Court of Appeals held that the contention that the exception in the latter part of the clause of 67*f* can have reference only to liens on property which, if the liens were annulled, would pass to the trustee of the bankrupt released from the lien, would narrow the more obvious meaning of the words. The Circuit Court of Appeals further held that it was only because the property attached by the creditor remained *quoad* the attaching creditor the property of the bankrupt that the attachments were liens at all. It will be observed, therefore, that neither in the decision of the District Court nor of the Circuit Court of Appeals was it asserted that the liens were void because preferential, the result being reached because of the express language of section 67*f* of the Act; nor was it asserted that a lien upon property of one other than the bankrupt could create a preference in favor of the creditor who held the lien, the property in question being treated as the property of the bankrupt, at least so far as the attaching creditors were concerned.

It therefore appears that there is no conflict between the decision in these cases and that of other Circuit Courts of of Appeals, either upon the facts involved, since there has never been any other case of the kind, nor upon any of the principles which led to the decision. The cases were ably contested by counsel for the petitioners in both the District Court and the Circuit Court of Appeals, and every-

thing asserted in the petitions was called to the attention of both of those courts. It is respectfully submitted that the decision in these cases is amply justified by the opinion written by his Honor, Judge Morris.

For convenience of reference there is attached as an appendix hereto the opinion of Judge McDowell, of the United States District Court (as reported in 11 A. B. R., 435), and the opinion of Judge Morris, of the Circuit Court of Appeals, more legibly printed than in the Record.

The analysis which we have given of the decision in these cases further shows that there is no conflict between the views expressed by the District Court and the Circuit Court of Appeals for the Fourth Circuit and those of your Honorable Court as set forth in the cases cited by the petitioners. The three reasons asserted by the petitioners in their brief, in support of their request for special appeals, are reducible to one, which is shown to be of no validity when the real point of the decision in these cases is considered.

It is submitted, therefore, that nothing has been alleged in the petitions which takes these cases out of the ordinary rule that the decisions of the Circuit Courts of Appeals shall be final in bankruptcy matters.

For these reasons this court is respectfully asked to dismiss the petitions and to decline to grant the writs of *certiorari* prayed for.

H. GORDON McCOUCH,
S. & M. GRIFFIN,
SAMUEL W. COOPER,
JOHN DICKEY, Jr.,
ARTHUR G. DICKSON,
For Respondents.

APPENDIX.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA.

McDOWELL, J.:

C. R. Baird, who did business under the name of C. R. Baird & Co., was the owner of certain real estate situated in this district, known as the "West End Furnace property."

On December 7th, 1899, Baird, by written contract, sold the furnace property to the Roanoke Furnace Company, in consideration of the issue to Baird of certain shares of the vendee's capital stock and the assumption by the vendee of a purchase money debt owing on the furnace by Baird to R. E. Tod. This contract was never recorded. On November 5th, 1900, Baird executed and delivered to the Roanoke Furnace Company a deed in pursuance of the above-mentioned contract conveying the furnace property, which deed was forthwith recorded.

Between October 12th and 31st, 1900, at which time Baird was insolvent, some of Baird's creditors sued out from the Corporation Court of the City of Roanoke, Virginia, attachments which were levied on the above-mentioned properties.

On December 24th, 1900, other of Baird's creditors filed in the District Court for the Eastern District of Pennsylvania, a petition in bankruptcy against him. In due course that court adjudicated Baird a bankrupt. Early in the course of this proceeding ancillary jurisdiction was taken of the cause by this court.

The above-mentioned property has been sold by order of court, and the proceeds are deposited to await the determination of the questions hereinafter discussed.

By the registry statutes of this State unrecorded contracts of sale and conveyance of real estate are void, at least as to lien creditors.

The question here is presented by a petition filed by Staake, trustee, praying that the attachments above-mentioned be declared void as regards the creditors who sued them out, but preserved for the benefit of Baird's estate; and by a demurrer to this petition filed by the attaching creditors.

At the hearing all objections to the jurisdiction of this court were withdrawn, and jurisdiction is taken by express consent of all parties.

The demurrer to the petition is intended to raise merely the question as to whether the trustee of Baird's estate or the attaching creditors shall have the benefit of the attachments.

By 67*f* of the bankrupt law (Act of July 1st, 1898, Ch. 541, 30 Stat. 565 [U. S. Comp. St., 1901, page 3450]), all attachments obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt; and the property affected by the attachment shall be deemed wholly discharged and released from the same and shall pass to the trustee as part of the estate of the bankrupt, unless the court shall on due notice order that the right under such attachment shall be preserved for the benefit of the estate. In the case at bar the attachments were obtained through legal proceedings against Baird, within four months of the filing of the petition against him, and he was insolvent at the time. The language of this section so exactly fits the case we have here that some cogent reason must be found before we can properly hold that it does not apply.

Counsel for the attaching creditors, in an unusually excellent argument, take the position that the case at bar is not within the intent of the bankrupt law. They argue that it is so unjust and inequitable to take from the attaching creditors the fruits of their diligence and give

them to all the creditors *pro rata*, that Congress could not have intended the Act to apply in a case such as we have here. Nevertheless, counsel for these creditors necessarily admit that if Baird had never conveyed the furnace, or if his grantee had never recorded the deed, or if Baird had made a fraudulent conveyance, the Act plainly takes from the attaching creditors the fruits of their diligence and gives them to all the creditors *pro rata*. The argument that the law is unjust or inequitable is certainly as strong in any of the three supposed cases as in the case at bar. While the State law gives to diligent creditors who attach a priority of payment—a preference—over those who do not attach, it is beyond dispute that the intent of the bankrupt law (except as to rights gained more than four months before the filing of the petition in bankruptcy) is just the reverse. The intent of the latter, except as aforesaid, is to *pro rate* all available assets and to prevent any priority of payment being obtained by any creditor within the four months, whether by consent of the debtor or by the diligence of the creditor. Such being the intent of the law, it seems to me that the argument based on the supposed injustice of the Act as applied to case at bar is not of weight. Such being the intent of the law, it would be surprising if Congress had omitted to provide for the not uncommon state of facts which we have here. And, as above remarked, the language of 67*f* seems entirely adapted to the case we have here, as well as to other possible cases. In cases where the title to the attached property remains in the bankrupt, the liens of attaching creditors are simply annulled and the proceeds of the property are divided *pro rata* among all the creditors. In cases where the bankrupt has made a fraudulent conveyance, this deed is by proper proceeding set aside, the attachments are annulled and the proceeds of the property are *pro rated* among all the creditors. In cases where the bankrupt makes a valid conveyance, or where his fraudulent vendee makes a valid conveyance, the purpose of the law is worked out by preserving and enforcing the

liens of the attaching creditors for the *pro rata* benefit of all the creditors.

It is further argued that the case at bar is not within the intent of the Act, because the right here contended for by the trustee is not mentioned in section 70*a* of the Act. (30 Stat., 565 [U. S. Comp. St., 1901, page 3451]). This argument does not seem to me to be of force. Section 70*a* is an enumeration of those properties the title to which passes to the trustee by operation of law. The right here asked for by the trustee can be given him only by order of court. It would have been inconsistent, even absurd, to have provided in 70*a* that the rights of attaching creditors in a case such as we have here, shall vest in the trustee by operation of law, when it had been provided in 67*f* that such rights should be vested in the trustee by order of court.

It was further argued that the power to preserve and enforce liens for the benefit of all the creditors is given only as to liens that may be annulled under 67*f*, that only liens which give a preference are thus to be annulled, and that the liens here do not give a preference. While the argument is ingenious I can not assent to its soundness. If the attaching creditors are allowed to have the exclusive benefit of their liens I do not see why they are not in effect allowed a preference. In such event they will be paid in full, while the other creditors will receive only a small proportion of their claims. Again, 67*f* is not confined to liens that create a preference. Its language expressly embraces all liens obtained as were the liens in the case at bar.

Considerable effort was expended in argument on the proposition that an unrecorded contract of sale or deed is made void by the Virginia statutes only as to lien creditors, and that, even if there were doubt about this as a legal proposition, clause 9 of the agreed facts in effect so states. I see no necessity of discussing these questions. If it were admitted that the right contended for by the trustee had to be found in 70*a* before such right could be given him, this point might

be of considerable interest. But, as above stated, this right could not properly have been mentioned in 70*a*. The power of the court, and indeed, its duty, to take away from the attaching creditors the benefit of their liens and give it to the trustee is found specifically in 67*f*. To thus construe this section is in line with the undoubted policy of the Act; and its language is so sweeping and general, that I am constrained to believe that had Congress not intended such cases as we have here to fall within its purview, some specific provision would have been made excepting such cases.

So far as this branch of the case is concerned, I am of opinion that an order should be made subrogating the trustee to the rights of the attaching creditors in the fund derived from the sale of the furnace property.

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UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

NOVEMBER 15th, 1904.

MORRIS, District Judge.

The facts in these proceedings have been agreed upon, and are as follows:—

Chester R. Baird, trading as C. R. Baird & Co., on December 7th, 1899, owned certain real estate in Virginia, known as the West End Furnace Property, and as of said date he sold it to the Roanoke Furnace Company, subject to certain existing incumbrances, and executed a contract in writing and received from the Roanoke Furnace Company all the consideration to which he was entitled under the contract, to wit, shares amounting to $500,000 of the capital stock of the said Roanoke Furnace Company.

Under the contract of sale the Roanoke Furnace Company took immediate possession, in December, 1899, of the property so purchased, but no deed to the company was executed by Baird until November 5th, 1900, when a proper deed was executed and promptly recorded. In the meantime, during the month of October, 1900, nine different attachments, amounting to over $40,000, against Baird as a non-resident of Virginia were issued at the instance of certain of his creditors, and were levied upon the furnace property. Under the provisions of the laws of Virginia, no deed from Baird to the Furnace Company having been executed and recorded until after the attachments were levied, it is conceded that the attaching creditors acquired as against Baird and the Furnace Company a lien upon the property so levied upon.

(Code of Virginia, 1887, sections 2463, 2464, 2465, 2472.)

Within four months from the levying of the attachments, to wit, on December 24th, 1900, an involuntary petition in bankruptcy was filed against Baird in the United States District Court for the Eastern District of Penn-

sylvania, and he was adjudged a bankrupt, and on January 2d, 1901, the District Court of the United States for the Western District of Virginia assumed ancillary jurisdiction of so much of the bankruptcy proceedings as related to the property located in Virginia. On December 29th, 1900, also within four months from the levying of the attachments, an involuntary petition in bankruptcy was filed against the Roanoke Furnace Company, and such proceedings were had that it was adjudicated a bankrupt. On March 26th, 1901, William H. Staake was appointed trustee of the bankrupt estate of C. R. Baird, and on June 29th, 1901, John N. M. Shimer was appointed trustee of the bankrupt estate of the Roanoke Furnace Company.

Under orders of court the property conveyed by Baird to the Furnace Company was sold and the rights and claims of all the parties were transferred to the fund derived therefrom and all these claims were submitted to the determination of the court below by express consent of all the parties.

Upon the issues made by the petitions and answers the court below ruled that the attachments against Baird, having been obtained through legal proceedings against him, when he was insolvent and within four months prior to the filing of the petition in bankruptcy against him, were null and void under section 67*f* of the Bankruptcy Act of 1898, so far as they would give a preference to the attaching creditors, but that the liens should be preserved for the benefit of the bankrupt's estate, and that they should pass to and be preserved by the trustee for the benefit of the estate, and directed that the trustee of the bankrupt estate be subrogated to the rights of the attaching creditors, and authorized and empowered to enforce said attachment liens with like force and effect as the said attaching creditors might have done had not the bankruptcy proceedings interfered. * * *

Section 67*f* provides:—

"That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who

is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: *Provided*, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a *bona fide* purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

It cannot be disputed that the liens of the attachments in this case were obtained within four months by legal proceedings against a person who was insolvent, and that the court has on due notice ordered that the right under the attachments shall be preserved for the benefit of the estate and pass to and be preserved by the trustee for the benefit of the estate. There is therefore in the facts of this case a literal gratification of the words of this section. It is contended, however, that as the first clause of the section makes null and void the liens therein mentioned and declares that the property affected by the lien shall be wholly discharged and released therefrom and pass to the trustee as part of the estate of the bankrupt, therefore the exception in the latter part of the clause of 67*f* can have reference only to liens on property, which, if the liens were annulled, would pass to the trustee of the bankrupt released from the lien.

We think this is narrowing the more obvious meaning of the words. The wording seems clearly to contemplate that a creditor might obtain, by reason of his being a creditor of the bankrupt, a prohibited lien against property,

which would not, if unaffected, pass to the trustee in bankruptcy, and it would appear that it was for that reason the clause in question was inserted preserving the lien if the court should so order for the benefit of the estate and vesting it in the trustee.

A primary object of the bankrupt law is to prevent preferences and compel equality among creditors of the bankrupt, and there can be no doubt that the sequestering of attachment liens, such as those in question in this case, for the benefit of the general creditors does produce equality and prevent preferences.

The rule that the trustee takes the estate of the bankrupt in the same plight as the bankrupt held it is not applicable to liens which, although valid as to the bankrupt, are invalid as to creditors. This distinction is clearly stated in the following citation from *In re* New York Economical Printing Company, 110 Fed. Rep., 514, quoted by the Supreme Court of the United States in Hewit *vs.* Berlin Machine Works, 194 U. S., 302: "The Bankrupt Act does not vest the trustee with any better right or title to the bankrupt's property than belongs to the bankrupt or to his creditors at the time when the trustee's title accrues. The present Act, like all preceding Acts, contemplates that a lien good at that time as against the debtor and as against all his creditors shall remain undisturbed. If it is one which has been obtained in contravention of some provision of the Act, which is fraudulent as to creditors, or invalid as to creditors for want of record, it is invalid as to the trustee."

In the present case the sale by the bankrupt was void as against attaching creditors for want of a recorded deed. The property was levied upon by creditors, and by virtue of the attachments might have been sold under judicial process against the bankrupt. The levy was within four months of the filing of the petition in bankruptcy, and under section 67*f* the lien is preserved for the benefit of his estate. In the case of *In re* New York Economical Printing Co., above cited, Judge Wallace, speaking of the right of trustee in bankruptcy to treat as invalid a chattel mortgage which was not filed in compliance with the

laws of New York, and which, under the decisions in that State, could be treated as invalid only by creditors who had obtained judgments and acquired a lien, proceeded further to say: "Subdivision b, section 67 (Act of 1898), preserves for the benefit of the estate in bankruptcy a right which some particular creditor has been prevented from enforcing by the intervention of the debtor's bankruptcy. If a creditor by an execution or a creditor's bill has secured a legal or equitable lien upon mortgaged property before the mortgagor has been adjudicated a bankrupt, under this provision his rights will or will not inure to the benefit of the estate, depending upon the time when the lien was acquired. If acquired more than four months before the commencement of the bankruptcy proceedings, his lien would inure to his own exclusive benefit; but if acquired at any time within the four months it would be null and void under subdivision 'f' of the section, except as preserved for the benefit of the estate as provided in that subdivision and in subdivision 'b.'"

It is urged that by giving to the trustee of the bankrupt's estate the benefit of the attachments the court is taking from the attaching creditors property which did not belong to the bankrupt, and could not have passed to his trustee, but which was a right which the law of Virginia, because of a policy of its own, gave to the creditors in a property which did not in fact belong to the bankrupt.

We think that the Virginia law may well be considered as giving the right to the attaching creditor because *quoad* the attaching creditor the law regards the property so attached as to that extent still remaining the property of the bankrupt because of the want of a proper recorded evidence of transfer, and that it is because the law considers the furnace property to that extent as remaining the property of Baird that the attachments are liens at all.

We consider the language of section 67*f* so mandatory and imperative that we arrive at the conclusion that the ruling of the court below must be sustained.

* * * * * * *

Purnell, District Judge, dissents.